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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Nos. 78-857 and 78-997

NATIONAL LABOR RELATIONS BOARD

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Petitioners,

v.

YESHIVA UNIVERSITY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR YESHIVA UNIVERSITY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR YESHIVA UNIVERSITY

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that the full-time faculty members of Yeshiva University are supervisors and/or managerial personnel, and thus not to be treated as "employees," under the National Labor Relations Act, as amended (29 U.S.C. § 151 *et seq.*).

STATEMENT

A. The Facts About Yeshiva

As will appear in the description below (pp. 5-23), which follows essentially the detailed account of the facts in the opinion below (Pet. App. 5a-18a),[1] the several schools of the University vary in size, formal organization and operation. Preliminarily summarized, however, the record shows without dispute that the Yeshiva full-time faculty makes the almost uniformly decisive judgments in hiring and termination of faculty members, tenure, promotion, defining the curriculum (broadly at the outset, then continuously in adding and dropping courses), student admissions and expulsion, grading and degree requirements, and other matters of policy and management. The details vary from school to school. The individual schools are described below after an outline of the overall structure of the University.

1. The University

Yeshiva University, established under Jewish auspices, is a private institution of higher education, chartered under the laws of the State of New York (A. 7, 773-788, 847).[2] It embraces a broad range of traditional arts and sciences at graduate and undergraduate levels, large offerings of Hebrew and Judaic studies and professional

[1] "Pet. App." refers to the Appendix to the Board's petition for a writ of certiorari.

[2] What is now known as Yeshiva University was first incorporated in 1897 as The Rabbi Isaac Elchanan Theological Seminary (A. 7, 773-788). In 1970, the Seminary was separately incorporated (A. 776). The University is authorized to confer doctorates in education, law, medicine, philosophy and social welfare, and honorary doctoral degrees in divinity, Hebrew letters, Hebrew literature, humane letters, laws, pedagogy and science. Masters degrees are conferred in arts, education, science, science in education and social work. Bachelors degrees are conferred in arts and science. (A. 785-786.)

programs at the graduate level (A. 888, 912-939). In its five undergraduate schools and the five (out of eight) graduate schools involved here, it has approximately 225 full-time and 175 part-time faculty and some 2,500 students (A.11, 1282-1285, 1315-1325, 1338-1340, 1342-1343, 1355-1356, 1371-1372, 1399-1400, 1411-1413, 1417-1422).[3]

The University's five undergraduate schools and eight graduate schools are on four separate campuses in New York City: the Main Center (Washington Heights), the Graduate Center (Fifth Avenue), the Midtown Center (Lexington Avenue) and the Bronx Center. Found at the Main Center are Yeshiva College, Erna Michael College, the James Striar School, the Bernard Revel School, Yeshiva Program and the Belfer Graduate School of Science. The Graduate Center houses the Ferkauf Graduate School of Humanities and Social Sciences, the Wurzweiler School of Social Work and the Benjamin Cardozo School of Law. Teachers Institute for Women and Stern College for Women are located at the Midtown Center. The Albert Einstein College of Medicine and the Sue Golding Graduate Division of Medical Sciences are at the Bronx Center. (A. 845, 912, 966, 968, 1005, 1080, 1117.)

Yeshiva University has a self-perpetuating Board of Trustees, consisting (except for the President) of people with no administrative position at the school other than their membership on the Board (Employer's Ex. 22A at p. 129; R. 187).[4] The University's chief executive officer is the President, and there are, in addition, four vice presidents: for medical affairs and science, for student affairs, for business affairs and for academic affairs (*id.*).

[3] Faculty at the Albert Einstein College of Medicine, the Sue Golding Division and the Benjamin Cardozo School of Law were not petitioned for and were not included in the unit.

[4] "R." refers to the original record.

An Executive Council, consisting of the deans and directors of the University's various schools and divisions and certain other administrators, meets approximately twice a month. Primarily a "recommending body," the Executive Council discusses issues brought to it from anywhere within the University and makes recommendations to the President. (A. 41-42, 1188.)

Another organ of University-wide governance is the University Faculty Review Committee. The eight members of this committee, all of whom are full-time members of the faculty, are elected from the various schools of the University. (A. 1216-1217.) They are empowered to act as a hearing committee in discipline and termination cases arising under the University's tenure regulations and in cases concerning promotions (A. 1215-1216). If a case cannot be satisfactorily resolved at a lower level, the final step of the grievance procedure is a recommendation by the committee directly to the dean of the school or, where appropriate, to the President (A. 1215).

Yeshiva has two academic councils: the Graduate Council and the Undergraduate Council. The membership of each consists of two elected faculty representatives, two student representatives, the dean or director of each of the schools involved and members of the central administration. (A. 1171-1176.) The charges of these councils are officially stated as being "on their respective levels, the initiation of programs among the various divisions to develop a feeling of University fellowship; achievement of academic excellence; coordination and cooperation among the divisions" (A. 1188). Beginning in the fall of 1974, the councils started meeting together as a single Committee on Academic Priorities and Resource Allocation (A. 59-60, 329). The purpose of this committee is to provide, for the first time, a set of long-range academic

and fiscal priorities for the University as a whole, touching such matters as the various schools' objectives, class size, staffing patterns, degree requirements, course offerings, admissions, student services, physical facilities, fund raising and tuition levels (A. 330-332).

2. **Stern College for Women**

The Dean of Stern College, who like most deans and many members of the central administration retains his faculty rank, considers himself responsible to serve as the "educational leader" of the college and to report to the President through the Vice President for Academic Affairs "on how the college is conducting itself" (A. 182).

Curriculum is determined ultimately by the faculty as a whole conveying effective determinations to department chairmen and then, in turn, to the Dean (A. 189-190). The Curriculum Committee (comprised of the department chairmen, the Dean and a representative of the Registrar's Office) passes on all changes in graduation requirements and recommends to the faculty any programmatic changes (*id.*). The only power of the Dean to add new courses is a power delegated by the committee: if a department chairman and the Dean agree that a course affects only one department, it can be added without the committee's approval (A. 190). When, during the 1969-70 academic year, the faculty as a whole disagreed with a decision by the Dean and the committee to delete the education major at Stern, the faculty required the Dean to reinstitute it (A. 191).

The Faculty Committee on Academic Standards both sets general standards and decides whether an individual student whose performance is inadequate will be required to leave the school. The Dean has never overruled the committee on such a determination. (A. 188-189.)

Similarly, the Faculty Admissions Committee both establishes admissions standards and decides on individual admissions (A. 191-192).

Other effective recommendations have been made by various other faculty committees, and participation in such committee work, as well as in department and faculty meetings, is part of the faculty's regular endeavors (A. 238). An *ad hoc* Faculty Committee on Grade Distribution recommended a change in the school's grading system which was adopted by the faculty (A. 196). The faculty, upon the recommendation of the Committee on Scheduling Patterns, introduced a new scheduling model for the school (A. 202-203). The Committee on Personnel and Budget, formed in response to budgetary strictures, made generally effective recommendations to the faculty for elimination of elective courses, establishment of joint courses with graduate schools and changes in scheduling (A. 205-206).

There is also a Stern College Senate consisting of six faculty and six student representatives and one representative each for alumni, for the Office of the Dean and for the Office of Student Services (A. 1295). The faculty, alumni and student representatives are elected by their respective constituencies (*id.*). "[A]ll matters affecting the affairs of the college are the proper matter for consideration and action by the Senate" (A. 208). The Senate acts by making recommendations to the faculty which when approved or not disapproved are deemed in effect unless and until the President disapproves of them (A. 209, 1298). Recommendations were made to the faculty during the year preceding the hearing concerning such matters as foreign language requirements for a degree, scheduling patterns and the cooperative program at the school (A. 208).

Stern's nine department chairmen make effective recommendations to the Dean regarding hiring, reappointment, termination, promotion and tenure (A. 193-194, 212-213, 216, 218, 228, 232-233, 240-241).[5] The need to hire a new full- or part-time faculty member is generally called to the Dean's attention by the department chairman. Interviewing is done jointly by the Dean and the chairman, and the Dean has never made an appointment that was not recommended by the chairman. (A. 210.) Approval by the President of hiring recommendations is "routine" (A. 213).

Chairmen make similarly effective recommendations regarding termination of part-time and probationary full-time faculty, and the Dean has only once disagreed with the recommendation of a chairman regarding termination (A. 212-215, 240-241). This exception occurred in 1970-71 when it was necessary to release staff because of a shrinking budget. At that time, the Dean's recommendation and the chairman's were submitted to the President, who sustained the Dean. Thereafter, the issue was

[5] The following table shows where department chairmen are situated (for the most part in the University's larger schools) and how they are chosen (A. 209, 271, 317, 369, 410, 625, 673, 1282, 1315, 1338, 1342, 1411, 1417, Employer's Ex. 129).

School	Number of Chairmen	How Chosen
Yeshiva College	15	Seniority
Stern College	9	Dean
James Striar School	2	Seniority and Faculty Consensus
Ferkauf Graduate School	5	Faculty Recommendation
Belfer Graduate School	4	Elected
Erna Michael College	3	Seniority
Bernard Revel School	7	[Not in Record]

presented to the University Review Committee, which found the issue outside its charge. (A. 214-215, 1313.)

The tenure process also begins with a recommendation from the chairman. All negative tenure recommendations by chairmen have been accepted by the Dean and the administration. The only positive recommendation the Dean has ever disagreed with occurred when a chairman recommended himself for tenure, and in that case the chairman was in fact granted tenure. (A. 216-217, 232-233.) The information considered by the chairmen in connection with tenure recommendations includes the candidate's "activity within the college" and "service to the university other than through the college" (A. 231).

Authority over promotions is shared by the chairmen and a Promotions Committee consisting of the Dean and five elected faculty members, three of whom are department chairmen (A. 233, 1301). The committee solicits promotion recommendations from the chairmen (A. 217-218). The committee has never recommended a promotion over a chairman's negative recommendation, and in six years of service the Dean has accepted all the committee's promotion decisions. The President has granted "the great majority" of recommended promotions, and has never overruled a negative recommendation. (A. 193-194, 217-218.)

3. **Yeshiva College**

According to its Dean, who is also a professor of linguistics, the management of Yeshiva College is entrusted to its faculty, under his leadership, with some student involvement (A. 244-246).

The College Senate is composed of faculty, administration, student and alumni members, with control resting largely in the faculty (A. 1327-1328). The Senate Constitution provides that it has jurisdiction over admissions policy, curriculum, degree requirements, standards of scholastic performance, student attendance, the grading system and academic honors (A. 1329-1330). All measures passed by the Senate may be vetoed by the Faculty Assembly or the President of the University (A. 1330).

Under the College's Faculty Statute (A. 1220-1233), "[s]ubject to approval by the President," the final authority to legislate on all "academic" matters rests with the Faculty Assembly, whose "regular members" include all regular faculty with full-time programs and a "regular appointment on an annual salary" (A. 1220). The Faculty Assembly is empowered to take action binding on the Dean (A. 248-249). This is true even when the Dean himself has voted against the particular measure (A. 249).

During the sixteen-year tenure of the Dean, the President has never vetoed an action of the Senate or Faculty Assembly (A. 250). On one occasion during those years, the President asked the Senate to reconsider a measure, and the Senate left the measure unenacted. On another occasion, he disagreed with a resolution concerning retirement. (A. 250, 713.) The Dean has no veto power over decisions of the Senate or the Faculty Assembly (A. 248-250).

A major component of the College's governance consists of faculty committees.[6] The Scholastic Standing Committee makes all decisions on probation and academic dismissal for students, handles all requests for early

[6] As a matter of University-wide policy, reflected in the Faculty Handbook, each "faculty member * * * [is] expected to fulfill his service on faculty committees and other such normal faculty obligations." (A. 1189.)

graduation,[7] for honors projects and for independent studies, and has been directed by the Faculty Assembly to study and to recommend changes in the grading system (A. 255-256). The residency requirement and grading standards materially affect the ability of the University and the College to attract and retain students (A. 260-262). Authority to introduce new courses at the College is shared by the Curriculum Committee, the faculty, and the affected subject area and division, acting in consultation with its chairman (A. 250-252, 293-294, 682-685, 699, 704, 711-712). The Dean's limited authority, which comes from the faculty, is to introduce new courses for one term on an experimental basis (A. 252-253).

Yeshiva College is divided into "subject areas," which are the equivalents of departments in other schools. Subject areas are in turn organized into four broad "divisions." The faculty member with the most seniority in a subject area is the "senior professor";[8] in the everyday language of the school, he is referred to as the department chairman. The chairman participates together with other faculty in departmental meetings that set departmental policy. (A. 271, 695-696.) One professor from each of the four divisions is elected by the faculty to serve as the division chairman (*id.*). The four division chairmen meet as the Advisory Council, a body created by the faculty (A. 266, 270). Senior professors meet as the Committee of Senior Professors (A. 271, 276).

Faculty promotions at the College are determined by division chairmen, acting individually and as members of the Advisory Council. The process begins with a recommendation from the chairman to the council. (A. 267.) The President has always followed decisions of the council, whether positive or negative (A. 269-270). The President has granted a promotion opposed by the Dean but favored by the council, and has denied promotions when favored by the Dean but opposed by the council (A. 268-270).[9]

Sabbaticals are handled in a fashion similar to promotions. The division chairman makes a recommendation to the Advisory Council for or against granting a sabbatical (A. 270). Although ultimate authority rests with the Dean and the President under the Faculty Handbook (A. 1198), the chairman's recommendations are generally accepted by the council, and the council's decisions have never been overruled by the Dean or the President (A. 270).

Effective recommendations are made by senior professors in the hiring of full- and part-time faculty (A. 272). Either the Dean or the senior professor first determines that an additional faculty member is necessary. Initial screening of applications and interviewing are handled by the senior professor. The senior professor chooses the applicants who will be given a further interview, which is conducted either by the Dean or by the Dean and the senior professor. The Dean and the senior professor then make a joint hiring decision, with the Dean generally accepting the recommendation of the senior

[7] The College has an eight-semester residency requirement that was established by the Faculty Assembly (A. 260-261).

[8] The sole exception is in the English subject area, where for many years a less senior faculty member has acted as senior professor (A. 271).

[9] The Faculty Handbook requires that each degree-granting school "draw up in writing its requirements for promotion," and "invite faculty participation in the formulation and in the continual reevaluation of these rules," circulating them among all members of the faculty (A. 1181). Under the Handbook, "[r]equirements for promotion [must] be based on quality of service and achievement," including service to the school and to the University through participation in various faculty committees and similar bodies (A. 1181, 1189).

professor (A. 272). The opposition of a senior professor is sufficient to block an appointment (A. 272-274). During his sixteen-year incumbency, the Dean has in almost every case accepted both positive and negative recommendations of senior professors regarding the termination and reappointment of part-time and probationary full-time faculty (A. 272-273, 275-276).

The record is, then, that decisions for and against hiring are virtually always the faculty decisions just described. Final authority rests, as stated in the Faculty Handbook, with the President (A. 1189).[10] At the College, however, as at most other schools of the University, the actual role of the President and the Dean has been for the most part to ratify routinely the hiring recommendations of the various schools' faculty and department chairmen (A. 210, 213, 272-274, 333-335, 388, 404-405, 423, 524, 528, 551-552, 624-625, 639-640).

Finally, senior professors largely determine the budgets of their subject areas. Each senior professor makes budgetary requests, which "99 percent" of the time receive the "perfunctory" approval of the Dean. The requests have never been rejected by the University administration. (A. 298-299.)

4. **Erna Michael College**

Erna Michael College provides men with undergraduate training for administrative or teaching careers in Hebrew and Jewish studies. The school, whose Dean teaches a reduced load, is governed by consensus of the faculty. (A. 304-305, 328.) Once a consensus has been reached, the Dean's role is "simply [to] carry out the mandate of the faculty" (A. 328).

[10] The Faculty Handbook says: "Faculty appointments are made by the President, on recommendation of the dean or director of the particular school." (A. 1189.)

The governing body at Erna Michael is the faculty meeting. Subjects handled at faculty meetings include admissions procedures, curricular matters, grading, attendance, course scheduling and the academic calendar. (A. 308-311.) Decisions in the faculty meetings have led to a substantial reduction in the number of hours required to be completed by students, with the result that faculty members teach fewer hours and teach three instead of at least four days a week (A. 310-311). The faculty has power to order the discontinuance of courses, even when this may result in the elimination of a teaching job (A. 326).

As in Yeshiva College, the Erna Michael Dean has regarded himself as bound when the faculty makes decisions with which he disagrees — for example, refusing to institute a trimester academic calendar and making changes in the grading system (A. 312-313). Neither the Dean nor any member of the administration has ever vetoed a faculty decision on curriculum, grading, scheduling or any other academic matters (*id.*).

Governance is also conducted in faculty subject area and committee meetings (A. 314-316). Subject area meetings, which function on consensus (A. 348), deal with curriculum and related matters, as does the Curriculum Committee, and the Admissions Committee establishes the criteria and procedures for student admissions (A. 314-316, 321-323).

Faculty decisions on course requirements and electives, on the degrees to be offered, and on the foundation of new programs were described by the Erna Michael Dean as amounting to a "restructuring" of the College, affecting the number and types of students and the needs for faculty (A. 325-326).

Senior professors are a "determining factor" in full-time hiring. The Dean depends on them to make initial investigations and to interview applicants. (A. 333-334.) The senior professor then makes a hiring recommendation, usually after consulting with other faculty in the department (A. 347). The Dean has never hired a full-time member of the faculty without the consent of the senior professor involved (A. 333-335). In fact, a professor has been hired over an applicant favored by the Dean because of the recommendation of the senior professor (A. 334-335). There is no difference between the full-time and part-time hiring process, and the salary of a new part-timer is set by the Dean based on the recommendation of the senior professor (A. 319, 341-342).

When it was necessary to terminate a faculty member for budgetary reasons, the decision as to which member to terminate, and the establishment of a program to cushion the termination (by retaining a faculty member for one year as a part-timer), were made jointly by the Dean and the senior professor involved (A. 335-336).

5. **Teachers Institute for Women**

The Teachers Institute for Women prepares women for positions as teachers of Hebrew literature, language and culture (A. 372).[11] There are no faculty ranks; all faculty members are "instructors." There are no department chairmen or senior professors. (A. 374-375.)

Teachers Institute's Director, Rabbi Faivelson, testified that "the faculty is the school" (A. 379). The faculty has made effective recommendations regarding the location of the school, which instructors should be terminated,

[11] The Board found that at the time of the hearings there were no full-time members of the Teachers Institute faculty, but noted that such faculty would be included in the unit when full-time appointments were made (Pet. App. 69a n.9).

the curriculum, degree requirements, admissions and faculty hiring (A. 379-381, 384-386, 388-390).

When the need to hire an additional member of the faculty arises, all members of the faculty are asked to make recommendations to the Director. He then asks the faculty if they have any objection to the applicants. No applicant is hired if there is "the slightest objection, even on one faculty member's part." (A. 388.)

The Director described an instance where, for budgetary reasons, he favored the termination of a faculty member. The faculty voted against the termination, and the faculty member was retained. (A. 385-386.)

There was also an occasion when Rabbi Faivelson recommended that Teachers Institute be moved to Brooklyn to attract more students. The faculty meeting rejected the proposal, and the school remained in Manhattan. (A. 379-380.)

6. **James Striar School of General Jewish Studies**

James Striar is another undergraduate school of Jewish studies, providing programs for men with little background in the area. Its Director, Rabbi Morris Besdin, teaches a full-time course load. (A. 352-354.) His role is to serve as "executive arm of the faculty" (A. 361). He testified that faculty meetings are "in a great sense, decisive as to the direction of the school" (A. 358). Subjects of faculty governance and decision-making have included curriculum, administrative regulations, absences, testing and methods of teaching (A. 357-358). In one instance, where the Student Faculty Committee made a recommendation contrary to that of the Director regarding the school's guidance system, the faculty "overruled" him (A. 358-360). On the other hand, the Director could

not recall a time when he had overruled the faculty (A. 361).

7. Yeshiva Program

The Yeshiva Program provides an undergraduate program of study in Talmudic texts. Faculty members at the Yeshiva Program have no traditional faculty rank; instead, they are all designated "rosh yeshiva," which means, literally, "head of yeshiva" (A. 562, 575).

Rabbi Zevulun Charlop, who has been the school's Director since 1971, testified that in any given year the same course (one of the tractates of the Talmud) is taught by all members of the faculty (A. 562, 564-566). The choice of that course is made by consensus of the faculty, as are all other decisions at the school (A. 574). For example, the faculty decided to extend the academic calendar by approximately two weeks, and this decision was put into effect (A. 574-576). Although additions to the faculty are made jointly by Rabbi Charlop and the President, it is vital that they be "acceptable to the faculty" (A. 579).

8. Belfer Graduate School of Science

The Belfer Graduate School offers courses in chemistry, mathematics, physics, and mathematics and science education (A. 968-969).

Arthur Komar became Belfer's Dean in 1968 after the school's faculty accomplished the removal of his predecessor (A. 394-395). Thereafter, he was elected Acting Dean by the faculty, and he obtained a vote of approval from the faculty before accepting a permanent appointment as Dean (A. 395, 767-768). He was teaching one course at Belfer when he testified; he viewed his position as Dean as "first among equals" (A. 394, 409).

The Faculty Council is the "principal governing body" of the school, dealing with curriculum, size of departments, formation of new departments and "the financial status of the school," among other things (A. 403).

Faculty governance is handled for the most part by the school's departments, which have elected chairmen (A. 410-411, 470). The hiring of full-time faculty is decided by a vote of the department, and part-time hiring is determined by department consensus (A. 404-405, 423). Once the department determines whom to approach as a candidate for appointment, the chairman delivers to the Dean the department's choice (A. 405). The length of an appointment is also decided within the department by consensus (A. 406-407). The Dean's only role in hiring is as one member of the Physics Department, where his participation is like that of any other faculty member (A. 409).

Decisions on promotion, nonrenewal of faculty appointments and tenure are also made within each department by consensus. The Dean does not have the right to require the retention of a faculty member if the department decides not to renew that individual, nor may the Dean veto a department's tenure decision. (A. 418-419, 477-478.)

Each department determines its own curriculum, course assignments and student admissions standards. Each department also decides which individual applicants to admit and apportions grants of student aid. (A. 411-412, 420-422.) A Faculty Library Committee makes recommendations regarding library budget priorities that are always accepted (A. 403-404).

The elected chairmen make effective recommendations regarding salary increases for full-time faculty. Dur-

ing the two years immediately prior to the hearings, because of University-wide budgetary restrictions, the full increases recommended by the chairmen could not be given. However, both the priority sequence and the order of magnitude of salary increases were accepted by the administration. (A. 414-418.) In addition, the chairperson of the Mathematics and Science Education Department effectively recommended the cancellation of a tuition increase for her department (A. 413-414).

9. Ferkauf Graduate School of Humanities and Social Sciences

Joseph Gittler has been Dean of Ferkauf since 1966 (A. 595).[12] He stated that the principal governing body of the school is the faculty as a whole (A. 597-598). Thus, faculty meetings act on adoption of major changes in programs, the basic standards of the school, degree requirements, curriculum questions and changes in criteria for promotions (A. 599-600).

Much of the school's governance is by faculty committees. The Promotions Committee effectively determines questions of faculty promotions, the criteria being scholarly ability, growth in mastery of subject matter, teaching effectiveness and University service, *i.e.*, "reliable and productive service on committees at University, School or Department level" (A. 1443). All this occurs after the chairman of the affected department sounds out the sentiments of the faculty he represents and advises the committee (A. 170-171). A promotion has never been made in the face of a negative committee decision (A. 621). Out of approximately eighteen positive recommendations made during Gittler's nine years as Dean, only

[12] He is a member of the faculty, and taught one course in the fall immediately prior to his testimony (A. 595-596).

one recommended promotion was not made (A. 620-621).

Questions of tenure are effectively decided by the Council on Tenure, which consists of all the school's tenured faculty (A. 629-630). The council receives a recommendation from the affected department through its chairman after he has consulted with the members of the department (A. 170-171, 630). Neither Dean Gittler nor the administration has ever reversed a negative tenure decision of the council (A. 633-634). Only once has a positive recommendation not resulted in tenure. In that case, the council's vote was close, and when the department reconsidered the question, a majority of its faculty either voted against tenure or abstained. (A. 632-633.)

Other governance functions are handled by Ferkauf faculty members through their departments. Full-time faculty hiring decisions are effectively made by the faculty of a department, whose chairmen act in their behalf after consultation (A. 170-171, 623, 639). The Dean accepts "ninety-eight percent" of faculty appointments recommended by departments, and the administration has never vetoed an appointment (A. 624-625). The rank of new appointees, and thus placement on the salary scale, is also decided by the department faculty (A. 623-624).

The school's department chairmen are elected or chosen by consensus of the faculty, and then are routinely appointed by the Dean (A. 673). The normal workload equivalency at Ferkauf for full-time faculty and specific semester loads are established by the chairmen in consultation with their departments (A. 611, 664).[13] Sabbati-

[13] The Faculty Handbook states that "[t]he University has the right to expect that its full-time faculty members will devote themselves full-time to the services of the University," which has been set at a load of twelve contact hours or its equivalent (A. 11, 1189). The Handbook goes on to state, however, that "[e]ach school within the University will establish for its faculty regulations defining full-time faculty load in consonance with its needs and programs" (A. 1190).

cals are granted only after a positive recommendation from the department chairman (A. 636). Department chairmen recommend the hiring of part-time faculty, usually after consultation with members of the department. Gittler generally accepts those recommendations. (A. 639-640.)

A number of judgments affecting finances are made by the chairmen sitting together in the Chairmen's Council, where they act as representatives of the various departmental faculties that elected them (A. 664). The amount of money available for each department for part-time hiring is decided after discussions in the Chairmen's Council (A. 639). Until budget restrictions came into effect, about two years prior to the hearings, "every aspect of the budget" was deliberated by the council, and chairmen were to continue to have this budgetary responsibility when discretionary funds again became available (A. 626-627). In fact, when additional faculty appointments became possible, the allocation of appointments between departments was decided by the chairmen (A. 627). Tuition increases are never recommended by Gittler unless the chairmen agree, and recommendations for tuition increases are often initiated by the chairmen after consulting with members of their respective departments (A. 629). In Dean Gittler's words, through this council the "chairmen run the school" (A. 679).

10. Wurzweiler School of Social Work

The Acting Dean of Wurzweiler is Dr. Solomon Green, who retains his faculty rank and at the time he testified was teaching two courses (A. 495-496).

Dr. Green testified that "the internal operation of the school has been heavily governed by faculty decisions" (A. 502). "[T]he primary way that the faculty makes its

desires and will felt is at faculty meetings" (*id.*). These meetings are often concerned with curriculum matters, an area in which the faculty has been the final decision-making body (A. 503-504).

The faculty also makes important budgetary decisions. When it was necessary to generate additional income, the faculty made the decision to increase the size of the student body (A. 505-506). When the Dean proposed a $500 tuition increase, the faculty effectively limited the increase to $300 (A. 505). Dismissal of students for academic inadequacy, with resulting consequences for tuition income, is also decided by vote of the faculty (A. 504-505).

Other faculty governance functions are carried out by means of faculty committees. A committee monitors the work of the school's community social work program to ensure that it meets the goals of the agency providing the program's funding (A. 522-523). The Field Instruction Committee watches over the program through which students are placed with outside social agencies. Together with the Dean and the Field Instruction Coordinator, a member of the faculty, the committee chooses outside agencies, a responsibility which is delegated by the faculty. (A. 556-557.)

The hiring, promotion, termination and tenure policies of the school were, at the time of the hearings, in a state of transition. Hiring was being conducted by an *ad hoc* faculty selection committee that interviewed candidates submitted to it by the Dean (A. 524). Except in one instance where there were only two candidates, one of whom the Dean believed to be "very desirable," the Dean has submitted several candidates to the committee and has accepted all of their recommendations (A. 551-552, 554).

When the NLRB hearings were in progress, the School's Personnel Committee had drawn up guidelines for revision of the hiring, tenure, termination and promotion policies (A. 1401-1410). The determinative role of the faculty in hiring was to be retained, and the faculty's role in promotion, tenure and termination was to be substantially expanded (*id.*). A faculty meeting, held shortly before Dr. Green testified, enacted only part of the guidelines; the remainder of the proposal was submitted to a committee for further study (*id.*). Except for a minor clause contradicting the University's Faculty Handbook,[14] Green confirmed that the Wurzweiler faculty had the authority to promulgate such guidelines, which were binding upon the Dean (A. 537).

11. Bernard Revel Graduate School

Bernard Revel is a graduate school of Jewish studies (A. 1124). At the time of the hearing it had no permanent dean (*id.*). Dr. Leo Landman, the Secretary of the Faculty, handled the day-to-day running of the school, as he had done even when there was a dean (R. 3806). At the time Dr. Landman testified, he was teaching two courses (A. 560).

The faculty is Revel's final decision-making body "with regard to academic matters such as curriculum requirements, degree requirements and admissions standards" (A. 583). Decisions are made at faculty meetings by consensus; when a consensus has been reached on curriculum matters, admissions requirements, degree requirements, or the introduction of new courses, the faculty's decision is generally given effect (A. 583-586).

[14] The clause would have permitted full-time faculty initially financed by grant funds to have such service credited in considering eligibility for tenure (A. 536).

Revel department chairmen recommend both full- and part-time candidates for positions in their departments, and the recommendations are "generally given effect" (A. 588). During the entire period in which Dr. Landman has been at Revel, recommendations not to hire have never been reversed (*id.*).

B. The Board's Proceedings and Decisions

On December 5, 1975, a three-member panel of the Labor Board rendered the basic decision involved here, directing an election sought by petitioner Union in a bargaining unit consisting of all full-time faculty at the University (Pet. App. 68a-79a). In the ruling of present consequence, the Board rejected the University's position that its faculty members are managerial or supervisory personnel and, therefore, not "employees" within the meaning of the Act.

Referring to the large evidentiary record made on this subject, but without specific findings as to Yeshiva University, the Board (1) declined to "reconsider its previous decisions on this issue" and (2) rejected the University's contention "that this particular faculty has authority which is different from and more extensive than the authority vested in the faculties which were the subjects of the earlier cases" (Pet. App. 67a). As in its prior cases, the Board concluded, the Yeshiva faculty's role in governance is not managerial or supervisory because its

> participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than "in the interest of the employer," and final authority rests with the board of trustees. As in the earlier decisions, we find that the faculty members are professional

employees under the Act who are entitled to vote for or against collective-bargaining representation. [Pet. App. 68a; footnote omitted.]

Following that decision, petitioner Union won an election and demanded bargaining rights. In the usual procedure for testing such a demand, the University refused to bargain and the Union brought an unfair labor practice proceeding. The Board, on August 24, 1977, reaffirmed the views it had stated in directing an election, and held that the refusal to bargain was an unfair labor practice (Pet. App. 45a-60a). On October 17, 1977, the Board petitioned for enforcement of its resulting order (Pet. App. 4a).

C. The Decision Below

In appraising the record submitted on the petition for enforcement, the Court of Appeals said (Pet. App. 7a-8a):

> Each school, college and program at Yeshiva enjoys great autonomy in determining its own curriculum, grading system, and academic standards as well as in a wide variety of other matters. Therefore the role of the faculty at Yeshiva can best be appreciated by a review of the individual academic units of the University.

The Court proceeded to the review thus found to be essential (Pet. App. 8a-17a). As a result of that effort, it said (Pet. App. 21a-23a; footnotes omitted):

> The record, which has been set forth in some detail * * * and which is not controverted by the Board, strongly supports the contention of Yeshiva that a full-time faculty, acting at times through committees or department chairmen, and at other

times as a body, exercises supervisory and managerial functions as defined by section 2(11) of the Act and within the Board's prior holdings as discussed in *NLRB* v. *Bell Aerospace Co., Division of Textron, Inc.* [416 U.S. 267 (1974).] We stress that our function is not to examine *in vacuo* the governance procedures of all four-year private institutions of learning described in the briefs of the *amici* universities as "mature" institutions of higher education. Many such institutions have apparently adopted a collegial decision making process in which the faculty plays a decisive role in the development of institutional policy. Given the great diversity in governance structure and allocation of power at such universities it is appropriate to address ourselves solely to the situation at the institution involved in this proceeding. *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 556 (1st Cir. 1975). The record here discloses that in many instances the full-time faculty of the schools of Yeshiva without question effectively recommend the hiring, promotion, salary and tenure of the faculty of the University in a manner which can hardly be described as routine or clerical. They further perform managerial functions not only by their personnel decisions but by adopting the standards of admission, the curriculum, the grading system and the graduation requirements of their school. Moreover, in particular cases the hiring of deans, the physical location of a school, teaching loads, and even the tuition to be charged were controlled by the full-time faculty. Indeed, the ability of the full-time faculty effectively to recommend or even to exercise many of the enumerated powers of section 2(11) and to formulate and effectuate University policy is not really disputed here. The Board's decision of December 5, 1975 treated the issue summarily.

Turning, then, to the Board's stated grounds for finding faculty to be neither supervisory nor managerial—namely, that faculty members are professionals, act collectively and make governance decisions in their own interests, and are subject to the ultimate authority of the board of trustees—the Court found these singly and collectively unavailing to defeat the showing of the faculty's supervisory and managerial functions (Pet. App. 24a-39a). Continuing, the Court observed that Congress appears not to have envisioned application of the National Labor Relations Act, as amended in 1947,

> to professional faculties in private institutions of higher learning. Their governance is unique and has no counterpart in the commercial business models the Act was designed to regulate. [Pet. App. 41a; footnotes omitted.]

Finding no justification in the Board's reasons for extending the Act to Yeshiva's faculty, the Court concluded that enforcement must be denied.[15]

SUMMARY OF ARGUMENT

The NLRB has evolved in this decade, and applied to Yeshiva University, special definitions of the words "managerial" and "supervisory" that result in coverage of university faculty as "employees" under the Labor Act. Ignoring policy- and decision-making powers of Yeshiva's faculty that it would deem managerial and supervisory in any other enterprise—powers over hiring, tenure, promotions, curriculum (the "product"), admissions (the "customers") and other basic matters —, the Board has given *ad hoc* reasons for its position. The Court of Appeals correctly rejected these reasons, and the Board's result resting upon them.

[15] Having denied enforcement upon the grounds stated, the Court of Appeals did not reach a number of other Board rulings the University had assailed, including, among other things, the inclusion of department chairmen and their counterparts, as well as two assistant deans and members of certain committees, and permitting terminal faculty to vote in the election.

I. A. Yeshiva's full-time faculty members are managerial personnel as defined by this Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). They perform policy-making and discretionary functions on a higher level and more broadly than industrial workers like expediters, buyers and others who have been held managerial and thus excluded from the definition of "employee" by the Board.

It is clear in good sense and in Board precedent that professionals may perform managerial functions, and Yeshiva's faculty does. The faculty's authority is none the less managerial for being "shared." While shared governance is of a special character in the University, the differences from industrial models disclose more, not less, decisional power in faculty members than in other varieties of managerial employees.

The notion in the Board's brief of faculty *versus* "management" has a false ring. Nobody talks or thinks of the university "management" because the term does not describe the reality. "In the most fundamental sense, the university is the faculty."[16] Or, as the Court of Appeals observed of Yeshiva's faculty (Pet. App. 27a), its broad powers amount in effect to its "substantially and pervasively operating the enterprise."

B. This University's full-time faculty also performs more than one of the functions making its members "supervisors" within Section 2(11) of the NLRA.

[16] American Association for Higher Education, *Faculty Participation in Academic Governance* 27 (1967).

Though the exact incidents vary from school to school, the full-time faculty throughout the University is commissioned to decide with substantial finality, or at least "effectively to recommend * * * action" with respect to, one or more of the subjects of hiring, termination, promotion, salary, tenure and the adjustment of grievances. Authority of this kind is clearly supervisory under the Board's own precedents. There is nothing in the character of faculty members as "professionals" that renders these precedents and their principles inapplicable. Indeed, the Board's decisions also show specifically that professionals answering the definition in Section 2(11) are "supervisors," not "employees," within the meaning of the Act.

II. The Board's special doctrines, announced in and after 1971, for treating university faculty members as employees, rather than managers or supervisors, are factually and legally misconceived.

A. Contrary to the Board's main thesis, the fact that faculty members act "collectively" does not negate either the managerial or the supervisory aspects of their role. (It is notable that Board counsel essentially forsake here this primary ground of the agency's decision.) The Board's decisions in its more accustomed world of industry show that managerial and supervisory personnel, so denominated under the Act, may function in groups or teams. In a striking inconsistency, the Board also opined that Yeshiva's faculty is comprised of "employees" because the professors are under the "ultimate authority" of a Board of Trustees. The Trustees, unlike the faculty, act *only* as a group; except for the President, and unlike faculty members, they lack any individual functions or authority in the University.

B. Equally unsubstantial (and comparably deprecated by Board counsel) is the point that faculty members lack managerial or supervisory status because they lack "final authority." The factual premise is dubious to begin with; regardless of where the formal last word is said, faculty decisions on a wide array of subjects (including curriculum, appointments, tenure, promotions and admissions) are virtually always final in fact. Apart from that, however, the Board again proposes doctrine in conflict with its own familiar principles. Most or all of its decisions declaring people managerial or supervisory under the Act concern individuals subject to the higher authority of others. There is no rational ground for the contradictory treatment of Yeshiva's faculty.

C. The Board commits similar errors when it holds the faculty to be neither managerial nor supervisory because the professors act in their own interest rather than that of "management." Once more, the solecistic reference to "management" is a part of the misconception. Nothing in the record, or in what we may all know about university professors, supports the conception that faculty members act more "for themselves," or less in the interest of the enterprise, than others exercising managerial or supervisory powers. Yeshiva's faculty is expected to assume, and does assume, a variety of such powers.

If the Board's concept means faculty people are more self-interested than the run of managers and supervisors, it is simply contrary to facts the Board itself has acknowledged. If it means faculty interests characteristically diverge from those of the institution, it is again at odds with the record and with the common perception that the faculty is at least the heart of the school.

D. This is not a case for special deference to the Board, which has misconceived the undisputed facts and misapplied the law. If, as we submit, the agency decision was neither consistent with the Act nor rationally defensible, it was properly denied enforcement by the Court of Appeals.

III. Board counsel elide much of the Board's rationale, and tend to substitute argumentation and nonrecord assertions of general fact that were not grounds for the agency's decision. This conflicts with the familiar requirement that the administrative determination be tested "solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

If the tardily imported claims were to be considered, they would be subjects of deep controversy. Against the assertions now made that NLRA coverage would benefit faculties and their institutions, there are cogent arguments, from responsible and authoritative academicians, that the result would be grave injury to the structures of faculty governance and shared authority now characteristic of at least the great colleges and universities. At most, the sociological suggestions and predictions in the briefs for the Board and *amici* indicate that there are profound questions in the background of this case, never plumbed by the Labor Board, that may well touch "the authority of the academic community to govern itself, an authority the free exercise of which is critical to the vitality of our society." *Cannon* v. *University of Chicago,* No. 77-926 (May 14, 1979) (Powell, J., dissenting), slip op. 18. These questions are not fairly to be answered by distorted versions of the NLRA fashioned uniquely for the academy. If such policy issues require statutory revisions, the determination is, of course, for Congress.

The task here is to appraise what the Board did in light of the existing statute and the principled meanings assigned to its terms over the decades. The Court of Appeals correctly faced and resolved the problem thus presented.

ARGUMENT

Introduction

As reflected in the scholarly opinion below, the question before the Court is answered by a principled construction of the National Labor Relations Act's pertinent provisions as their meaning has evolved during decades of administrative and judicial application. Sobering problems of educational philosophy and social policy hover in the wings. There is a temptation, to which some participants have yielded, to rely upon speculation about the benefits and detriments of collective bargaining for university professors and the possible effects of adversary struggle upon the quality and temper of the academy. But these subjects, essentially for legislative judgment, are not fairly within the material issues. The task, properly defined, is to apply the terms of the Act so that their meaning for universities is not at war with their usual meaning.

Perceived in this light by the Court of Appeals, the Board's decision was properly rejected because it rests upon arbitrary, *ad hoc* premises, specially and uniquely created for university faculties, that conflict with the statute and the authoritative definitions settled by the Board and the courts over the years. Though the Yeshiva faculty on this record clearly and undisputedly exercises powers that the Board and the courts have held "managerial" and "supervisory" in other kinds of enter-

prise, the Board has applied singular doctrines, unknown in earlier or different settings, to avoid such a conclusion.

The university is, to be sure, different in major respects from the shops and assembly lines that the Board normally regulates and that Congress had in view when it wrote the Act. The Board has acknowledged with wholesome candor the perplexities entailed by its resulting efforts to adapt. See *New York University,* 205 N.L.R.B. 4, 9 (1973); *Adelphi University,* 195 N.L.R.B. 639, 648 (1972). Respondent University does not question the propriety of those efforts or the legitimacy of the Board's exerting jurisdiction over the people in the academy who are fairly to be deemed "employees" covered by the Act. What is inadmissible, however, is the scrapping and contradiction of lawful general principles.

Our argument in a nutshell is that the Court below correctly identified and set aside this species of departure by the Board. Whatever may be true of other educational institutions, cf. *NLRB* v. *Wentworth Institute,* 515 F.2d 550, 556 (1st Cir. 1975), the University disclosed by the record here is a place where faculty shares heavily in management and supervision. The facts of this "shared management" are plain and undisputed. They show that Yeshiva's full-time faculty is responsible for, and effectively controls, usually with finality:

—Who will be hired.

—Who will be promoted.

—Who will be reappointed.

—Who will receive tenure.

—What the product of the enterprise will be, *i.e.,* what courses will be offered, who will teach them and when.

—How many students (customers) will be admitted and what admission standards must be met.

—What students will be retained, with all that implies financially.

Additionally, there can be no real question that full-time faculty members materially affect decisions concerning tuition levels, school locations and other matters that the parties agree in characterizing as "governance."

There is thus no factual controversy of any consequence and no question of dispositive "findings" supported by disputed evidence. Indeed, in contrast to the careful particularization in the decision below, the Board's decisions lack concrete findings of any kind. Moreover, the Board did not question — and its counsel do not question here — the performance of functions by Yeshiva's faculty that are analogues of functions performed by people who are "managers" and "supervisors" for purposes of the Act in other work contexts. Instead, the Board avoided this logical conclusion by its recently created, unexplained and unsupportable thoughts that faculty members are employees because they are professionals who act in their own interests, collectively, and without "final authority."

These are not, in our submission, meaningful conceptions about the nature and operation of a university like Yeshiva. More importantly, they are not sound tests for distinguishing supervisory and managerial personnel from "employees" covered by the National Labor Relations Act. The resulting error is not cured by new theories and questionable policy claims tendered now by counsel for the Board and *amici curiae.*

I. UNDER FAMILIAR DEFINITIONS, GENERALLY APPLIED, YESHIVA'S FULL-TIME FACULTY MEMBERS ARE MANAGERIAL AND SUPERVISORY PERSONNEL, NOT "EMPLOYEES," WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT

A. The Managerial Exclusion

The settled definition of "managerial employees" excludes from the coverage of the Act all personnel who "formulate, determine, and effectuate" an employer's policies. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 288-289 n.16 (1974).

The exclusion applies to staff members who are in no sense executives or even at a high level of the organizational hierarchy. Thus, expediters have been found to be "managerial" employees, *Spicer Mfg. Corp.*, 55 N.L.R.B. 1491, 1498 (1944), as have buyers, *American Locomotive Co.*, 92 N.L.R.B. 115, 116-117 (1950); *Electric Controller & Mfg. Co.*, 69 N.L.R.B. 1242, 1246 (1946), personnel investigators, *Western Electric Co.*, 100 N.L.R.B. 420, 423 (1952), production schedulers, *Firestone Tire and Rubber Co.*, 112 N.L.R.B. 571, 573 (1955), and lecturers, *Peter Kiewit Sons' Co.*, 106 N.L.R.B. 194, 196 (1953).

It is not necessary that a person manage or supervise other personnel to be excluded from a bargaining unit as a "managerial employee." In *Eastern Camera and Photo Corp.*, 140 N.L.R.B. 569, 572 (1963), the Board excluded the manager and assistant manager of an audio-visual department (the *only* employees in that department) as managerial, although they managed no personnel. The Board has also held that a professional employee, a clinical specialist in neonatology, was a "managerial employee," although she exercised no supervisory responsibility, and was herself subordinate to an associate director and the director of nursing. *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 193 (1976).

There has never been any doubt that professionals, other than university professors, can be excluded from the Act's definition of "employees" because they exercise discretion or perform decision- and policy-making functions that are managerial. See, *e.g.*, *Sutter Community Hospitals of Sacramento, Inc., supra,* 227 N.L.R.B. at 193 (clinical specialist in neonatology); *General Dynamics Corp.*, 213 N.L.R.B. 851, 860 (1974) (administrative accountants); *Peter Kiewit Sons' Co., supra,* 106 N.L.R.B. at 196 (lecturers).

It follows clearly, we think, that the Yeshiva faculty members are "managerial employees" in the sense of the pertinent exclusion from the Act. This faculty exercises far broader discretionary powers over a wide range of fundamental matters, central to the enterprise, than those that have led to the managerial characterization in many other settings. The Yeshiva faculty determines the curriculum (a major part of the academic "product"), the standards for admitting and retaining students ("customers") and, in significant degree, tuition ("price") levels.

At Yeshiva, "the quality and reputation" of the institution "depend primarily on the faculty."[17] They

[17] For the familiar prevalence of this condition, see B. Richman and R. Farmer, *Leadership, Goals, and Power in Higher Education* 258 (1976). See also the inaugural address of Williams College President Paul Ansel Chadbourne, quoted in Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication,* 21 U.C.L.A. L. Rev. 63, 70 n.16 (1973) (emphasis in original): "Professors are sometimes spoken of as working for the college. They *are* the college." Compare Rabbi Faivelson, herein (A. 379): "the faculty is the school."

make judgments of policy and specific determinations, commonly effective, with respect to hiring, promotion, salary and tenure. By any conceivable measure of common sense and experience, these are far higher, broader, more spacious and critical matters of managerial dimension than, for example, the circumscribed duties of purchasing, employment recommendations or product planning decisions affecting costs that have been found sufficient by the Board to entail managerial status. See *Western Electric Co., supra,* 100 N.L.R.B. at 422-423; *American Locomotive Co., supra,* 92 N.L.R.B. at 116-117; *American Lithofold Corp.,* 107 N.L.R.B. 1061, 1063 (1954).

The analogies to buyers, expediters, production schedulers and others are less than perfect, to be sure. But the imperfections tend further to undermine, not to justify, the Board's position. The Board has not suggested that the scope, impact, quality and nature of the University faculty's powers would be something less than "managerial" in terms of the general principles and precedents applied elsewhere. Rather, the Board's decision rested on unique and exceptional views about faculty, addressed in our argument under the next Point.

The fact that the faculty's authority is "shared authority" is stressed by the Board (Br. 36-39; Pet. App. 68a), but is neither disputed nor, in our submission, ground for doubting the managerial character of the faculty's responsibilities. The Board's analysis is not less flawed when it goes on, perhaps with less than entire consistency, to perceive a line between faculty and what is called the University's "management."

As mentioned just above, it is common ground that the industrial analogy is imperfect. That could have been in itself a strong indicator for the Board that Congress did

not intend to treat professors as "employees" in at least the "mature" four-year college or university.[18] As this Court said recently, when the Labor Act was adopted, "congressional attention focused on employment in private industry and on industrial recovery." *NLRB* v. *Catholic Bishop of Chicago,* No. 77-752 (March 21, 1979), slip op. 14. "It is not without significance," the Court also observed, "that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations *not* covered by the Act. S. Rep. No. 573, 74th Cong., 1st Sess. 7" (*id.;* emphasis in original). The Board strains (Br. 34-35 n.28) to find nothing of consequence in that observation,

[18] As reflected in the literature on academic governance and the careful specificity of the opinion below (see, *e.g.*, Pet. App. 22a), there may be relevant differences between junior colleges and some categories of relatively regimented four-year schools, on the one hand, and the more prestigious, well-established places attracting more sought-after faculty on the other. See American Association for Higher Education, *Faculty Participation in Academic Governance* 1, 10-11, 13 (1967). See also D. Bornheimer, G. Burns, G. Dumke, *The Faculty in Higher Education* 151-152 (1973):

> As has been pointed out, faculty members in most reputable colleges and universities in the United States today already play a significant role in policy making and in administration. In most of the better institutions, the appointment and recruitment of new faculty are left largely to the department. The candidate's future colleagues select him and judge his qualifications. In most instances, faculty members recommend on the granting of tenure and on promotion. The final decisions on these matters are usually left to deans or presidents, but most of the process is under the control of the faculty and any variance from the faculty's recommendation is serious enough to create a major issue.
>
> The faculty also has much to say in most colleges and universities about curriculum and program. Requirements for degrees are proposed by the faculties; courses are set up and administered by the faculty. There are few aspects of curriculum development, except as they relate to the broad and basic mission as a whole, of which the faculty members are not almost fully in control. Indeed, it is because of this very significant role in the above and similar decisions that we believe faculty members are already a part of higher education management rather than employees, as is suggested by those advocating faculty unions as a means of getting more power for the faculty.

or in the legislative history to which it refers, reducing it to a trivial instance of an employee criticizing "an employer," which would not, of course, be a "labor dispute" in a college any more than it would be in a machine shop or a bus terminal.

Having found no guidance in the suggested distinction between college professors and other workers, the Board proceeds to distinguish the modern faculty's powers of decision from "the medieval model of true collegial decision-making in which complete power and authority are vested in a group of peers" (Br. 36). But there is nothing in the National Labor Relations Act, as amended in 1947 and thereafter construed, to support the Board's reasoning from the supposed change since medieval times to the suggestion that powers otherwise "managerial" are something less for being shared. Passing even that, however, the fallacy in the Board's position is highlighted by its proposed dichotomy between "rank and file faculty" (Br. 24) and the university's "management," the argument on this score being that the faculty, exercising "independent professional judgment," cannot therefore be deemed to "serve as agents or representatives of the university's management" (Br. 36).

The notion of a "management" set over or against the faculty has no warrant in the present record or in the things we all know about the fully-developed colleges and universities of our time.[19] The word "management" grates strangely in this setting, as does the reference to "rank and

[19] See, *e.g.*, N. Demerath, R. Stephens, R. Taylor, *Power, Presidents, and Professors* 32 (1967) (emphasis in original): "The college or university scholar does not think of himself as an *employee* of the university, and he resents the suggestion that his relationship to a dean, a vice-president for academic affairs, and a president involves supervisory authority."

file faculty." The dissonance is not merely aesthetic; it comes from the intrinsic incongruity of the concepts. Much may have changed since the essence of education was seen to consist of Mark Hopkins, a log and a student, but surely not so much that it can sound other than ludicrous to speak of the faculty versus the "management" of a great university. Who is — who are — the "management"? Trustees? President? Deans? Transient administrators, often chosen by the faculty,[20] who come and go (or jealously retain faculty rank when they temporarily turn aside to administer) while the faculty endures and guides the destiny of the place they made and keep remaking?

Given the realities, it is neither accurate nor apt to suggest, as the Board does (Br. 32), that there is an absence of faculty "accountability" for managerial activities and responsibilities. The evidence is clear that Yeshiva faculty members are responsible, and are expected to be responsible, for managing broad portions of the educational enterprise, and that such activities are taken into account by their colleagues and by "administration" when determinations are made concerning reappointment, tenure and promotion (A. 191, 231-232, 238, 248-249, 268-269, 274, 328, 379-380, 419, 537, 1427-1428, 1448).

In sum, it is not necessary to insist, though many have, that if there were a single group comprising the

[20] The faculty, who have a long-range commitment to the university, fully expect to "have a significant role in the selection of academic administrators, including the president, academic deans, department heads, and chairmen * * *." *Faculty Participation in the Selection and Retention of Administrators*, Statement prepared by the AAUP's Committee on College and University Government and adopted by the Council of the American Association of University Professors in November 1974, in AAUP, *Policy Documents and Reports* 50 (1977).

essential heart of management, it would be the faculty.[21] It suffices that the faculty exercises powers basically and vitally managerial. This is ample basis in itself for rejecting the Board's view and sustaining the decision below.

B. The Supervisory Exclusion

In addition to their capacity as "managerial," the full-time faculty members of Yeshiva University perform supervisory functions enumerated in Section 2(11) of the Act, excluding them from the definition of covered "employee."[22]

Section 2(11) is written, and is to be read, in the disjunctive, so that an employee is a supervisor if he possesses authority to exercise any one of the powers set forth in that section or the authority effectively to recommend with respect to any one of them. *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1177 (2d Cir. 1968); *Ohio Power Co.* v. *NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949). The record of this case discloses a faculty whose members possess and

[21] "In the most fundamental sense, the university is the faculty." American Association for Higher Education, *Faculty Participation in Academic Governance* 27 (1967). See also, M. Ross, *The University, The Anatomy of Academe* 99 (1976), quoting M. Bundy: "when it comes to a crunch, in a first-class university it is the faculty which decides." Cf. B. Richman and R. Farmer, *Leadership, Goals, and Power in Education* 258 (1976).

[22] Section 2(3) of the Act (Bd. Br. 3) says the term "employee" "shall not include * * * any individual employed as a supervisor * * *." Section 2(11) (*id.*) says:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

exercise an array of supervisory powers. Employing learned and clearly "independent judgment," they have "authority," steadily and pervasively exercised, "effectively to recommend" the hiring, promotion, salary and tenure of the University faculty in a manner that can hardly be described as "routine or clerical * * *." 29 U.S.C. § 152(11).

Without reviewing all the evidences of this authority, it will be recalled that the Dean of Stern College has always accepted the decisions of the faculty Promotions Committee, and the President has never overruled a negative recommendation of that committee (A. 193-194, 217-218). At the Belfer Graduate School, faculty members make all decisions regarding faculty hiring, promotion, tenure and reappointment (A. 404-407, 418-419, 423, 477-478). At Ferkauf, as at Belfer, faculty hiring decisions are made by consensus of the department. Faculty promotions and tenure decisions at Ferkauf are determined by faculty committees. (A. 620-621, 624-625, 629-630, 633-634, 1443.) The Acting Dean at Wurzweiler testified that the faculty had the authority to determine the school's "labor policy" by promulgating guidelines, binding on him, that govern the school's hiring, promotion, tenure and termination policies (A. 537, 1401-1410).

If such supervisory authority were exercised by persons similarly situated in the industrial sector, the Board would exclude them from the unit. In *General Telephone Company of Michigan*, 112 N.L.R.B. 46 (1955), service assistants, who had "no authority to hire, discharge, assign, promote, or discipline employees," *id.* at 49 n.17, were held to be supervisors because their evaluations of operators were given "substantial weight" by chief operators. This was so even though the chief operators made "thorough investigations before disciplining operators or

effecting changes in their status, and [were] in a position to form personal estimates of their qualifications * * *." *Id.* at 49. Similarly, in *Pittsburgh Plate Glass Co.*, 115 N.L.R.B. 976, 977 (1956), laboratory assistants were held to be supervisors because their hiring recommendations were given "substantial weight" by management. See also *Howard Johnson Co.*, 236 N.L.R.B. No. 150 (1978), 1978 CCH-NLRB ¶19,440 at 32,328; *Miller Electric Co.*, 103 N.L.R.B. 1492 (1953). The Board's broad interpretation of the term "supervisor" in an industrial setting cannot be reconciled with the narrow interpretation it has applied here.[23]

The Board puts weight (Br. 29-32) on the proposition, which is not disputed, that "professional employees" may be within the Act's coverage and that professionals differ in possibly interesting respects from nonprofessionals. We are referred to legal and sociological theorizing about types of authority — "bureaucratic" versus professional, for example, suggesting the improbable notion that the two are necessarily distinct or clearly separable — and about varieties of loyalty. But with all of that, the decisive and obvious points here are (1) that

[23] The Board complains (Br. 50 n.43) that the decision below results in a 225 member full-time "faculty body made up of many supervisors and few employees." It argues that this is a "significant factor" against a finding of supervisory or managerial status (*id.*). If square industrial analogies were workable, it would be necessary to say on the other side that if the Board's decision had been upheld, the various schools of the University would be operating with faculty supervisory ratios far in excess of what is usually countenanced in the industrial setting. Thus, Yeshiva College would be operating with a full- and part-time faculty supervisory ratio of 118 to 1; Stern, with a ratio of 75 to 1; Belfer, with a ratio of 41 to 1; and Ferkauf, with a ratio of 59 to 1 (A. 1315-1321; R. 2177; Employer's Ex. 129; A. 1417-1418). In any event, like much else in the Board's brief, this was no part of the agency's rationale in this or any other university faculty case.

professionals are frequently "supervisors," and not covered "employees" for purposes of the Act, see, *e.g.*, *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1268 (1975); *General Dynamics Corp.*, 213 N.L.R.B. 851, 860, 862-863 (1974); *University of Chicago Library*, 205 N.L.R.B. 220 (1973), *enf'd*, 506 F.2d 1402 (7th Cir. 1974); *Claremont Colleges*, 198 N.L.R.B. 811 (1972); *Westinghouse Electric Corp.*, 163 N.L.R.B. 723 (1967), *enf'd*, 424 F.2d 1151 (7th Cir.), *cert. denied*, 400 U.S. 831 (1970); *Puget Sound Power & Light Co.*, 117 N.L.R.B. 1825, 1827 (1957), and (2) that the Board's argumentation on this subject nowhere suggests why on the record of this case Yeshiva's faculty members are outside the statutory definition.

II. THE BOARD'S SPECIAL CRITERIA FOR TREATING YESHIVA'S FACULTY MEMBERS AS COVERED "EMPLOYEES" ARE WITHOUT BASIS IN THE RECORD OR IN LAW

When it came in 1971, in *C. W. Post Center of Long Island University*, 189 N.L.R.B. 904, to consider for the first time if university faculty members should be classified as "employees" within the Act, the Board recognized that it was exploring an "unchartered [*sic*] area * * *." *Id.* at 905. It did not proceed, however, either (1) to extrapolate from its experience and from the principles evolved over the quarter-century since the Taft-Hartley Act, or (2) to evolve a principled basis for a new departure in deciding whether faculty should be excluded as either managerial or supervisory personnel. It merely announced, without suggesting a source or a rationale, "that the policymaking and quasi-supervisory authority" of the full-time faculty there involved, "exercised by them only as a group [, did] not make them supervisors within the meaning of Section 2(11) of the Act * * *." *Id.* The entire

statement of this significant departure is in a brief quotation (*id.* at 905; footnote omitted):

> Mindful that we are to some extent entering into an unchartered area, we are of the view that the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the Act, or managerial employees who must be separately represented. Accordingly, we find that full-time university faculty members qualify in every respect as professional employees under Section 2(12) of the Act, and are therefore entitled to all the benefits of collective bargaining if they so desire.

A little earlier in its new efforts respecting university employment relationships, dealing with nonfaculty employees, the Board had followed the sound course of consulting and applying the same general principles to the educational setting as those applicable under its statute to other forms of enterprise. In *Cornell University,* 183 N.L.R.B. 329, 336 (1970), starting with a locution like that of a year later in *C. W. Post,* the Board followed familiar principles of unit definition under the Act:

> We are mindful that we are entering into a hitherto uncharted area. Nevertheless, we regard the above principles [*i.e.*, prior bargaining history, extent of employee interchange, and others evolved in prior Board cases] as reliable guides to organization in the educational context as they have been in the industrial, and will apply them to the circumstances of the instant case.[24]

[24] The Board followed this mode of analysis in its unit determination in *C. W. Post, supra,* 189 N.L.R.B. at 905, though not in its conclusion concerning the claimed supervisory status of faculty members. To the same effect, see *Fordham University,* 193 N.L.R.B. 134, 137 (1971).

Eschewing such "reliable guides" in deciding whether the members of Yeshiva's faculty are managerial or supervisory personnel, the Board has not justified its stated grounds for importing special concepts into this area. This is not to say that the Board must treat all employment relationships identically. But it is not empowered, any more than other tribunals under the rule of law, to announce arbitrary doctrines that lead to unlike treatment of cases exhibiting no differences shown to be material under the statute. The elementary beginning, after all, is an enactment entrusted to the Board for principled and general application.[25] As the Court of Appeals held, the Board departed from this mandate in its stated grounds for holding Yeshiva's faculty members to be neither managerial nor supervisory.[26]

[25] It hardly furthers the principled and general application of the Act for the Board's counsel now to argue that the Court of Appeals should be reversed because the result reached below "effectively converts all rank and file faculty members into managers or supervisors with no substantial body of employees to oversee" (Br. 24; see also Br. 50 n.43).

The record shows, without dispute, that the members of the faculty, in the unique circumstances of university governance, do indeed manage and do indeed supervise each other with respect to basic subjects like hiring, promotion, tenure (job security) and others. These are the hallmarks of supervisory status in industry. The fact that universities are different cannot change these hallmarks. Moreover, the complaint that all faculty members are treated together comes dubiously from an agency that did exactly likewise — ruling that junior faculty, senior faculty, chairmen, the tenured and the untenured are all "employees," or, as the Board's brief now says, "rank and file" members.

[26] Contrary to suggestions of the Board, YUFA and the AFT (see Board Br. 34 n.28, 44-50; YUFA Br. 36-40; AFT Br. 14-15), nothing in the legislative history of the 1974 health care amendments to the National Labor Relations Act warrants a different conclusion. True, Congress recognized during the process of reaching the 1974 changes that the Board had previously taken jurisdiction over private colleges and universities. See *Cornell University, supra,* 183 N.L.R.B. at 329; compare *Trustees of Columbia University,* 97 N.L.R.B. 424 (1951). At no point in the debates or relevant reports, however, did

(Footnote continued on next page)

A. "Collective" or "Group" Exercise Does Not Negate Managerial or Supervisory Authority

The fact of "group" or "collective" exercise was the first ground announced by the Board, in *C. W. Post, supra,* for denying that university faculty should be deemed managerial or supervisory and for holding, as a consequence, for the first time that such faculty members are "employees" covered by the Act. (Grounds added later are discussed *infra,* pp. 48-53.) It may be specially notable, therefore, that this continued aspect of the Board's position, applied in the present case to Yeshiva, is relegated to a footnote, as something the Board "noted," in government counsel's defense here of the Board's decision (Br. 40-41 n.35). Cf. *SEC* v. *Chenery Corp., supra,* 332 U.S. at 196. The point is in any event indefensible.

There is no statutory language or history to support the Board's peculiar view of powers exercised collectively. On the contrary, relevant precedents, including the Board's own, vindicate the position of the Court of Appeals on this subject.

In a controlling decision, this Court (as well as the Board, though it had erred in another respect) made clear

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(Footnote continued from previous page)

Congress consider the question of faculty coverage, let alone the "supervisory" and "managerial" concepts that the Board has adopted in faculty status cases decided after *Cornell University, supra.* Counsel for a Committee of Interns and Residents, who is also counsel for YUFA here, submitted a written Appendix to his Statement at the Hearings referring to some of the faculty cases. *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor and Public Welfare,* 93rd Cong., 1st Sess. 316-319 (1973). But it appears never to have been noted — it certainly was not mentioned — by any member of either House at any time. What is plain is that, as Senator Williams, sponsor of the Senate bill, noted, the health care amendments were "carefully tailored" only to the specific needs of the health care industry. 120 Cong. Rec. 22576 (1974).

that an employee functioning as part of a "team" may be "managerial" in the pertinent sense. See *NLRB* v. *Bell Aerospace Co., supra,* 416 U.S. at 270-271. Similarly, in *Retail Store Employees Union, Local 428,* 163 N.L.R.B. 431, 432 n.4 (1967), the Board found that two office clerical employees were managerial personnel because they served as officers of the respondent union and in their capacity as officers were members of the union's executive board, which passed upon the hiring and discharging of organizers and made other policy decisions.[27]

The Board's otherwise unprecedented and unexplained idea that power collectively exercised cannot be managerial is particularly inconsonant in the present setting, where the Board advances the further point (see *infra,* pp. 48-49) that the faculty's power is less than significantly managerial because it is subject to the "ultimate authority" of Yeshiva's Board of Trustees. The Board of Trustees exists for Yeshiva only as a collectivity. Its members, except for the President, are outsiders, functioning for the University only in their group capacity. It is anomalous that the Labor Board should attribute vital importance to the Trustees' group power while discounting altogether the faculty's managerial functioning because it is conducted in groups and committees.

The Court of Appeals was on solid ground when it said on this subject (Pet. App. 32a):

> Logically, we see no reason that the fact that the policies of a company are created by a group (as indeed they usually are by the Board of Directors) rather than by an individual should be of significance

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[27] Cf. *Sida of Hawaii, Inc.,* 191 N.L.R.B. 194, 195 (1971); *Red and White Airway Cab Co.,* 123 N.L.R.B. 83, 85 (1959); *Brookings Plywood Corp.,* 98 N.L.R.B. 794, 798 (1952). In these cases, employee-shareholders were excluded from the bargaining units where as a group they held sufficient shares to give them an effective voice in the formulation of corporate policy.

in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor.

The Board offered no ". atisfactory rationale" because there is none. Common knowledge, to say nothing of an extensive literature on business management, confirms that managerial power is regularly exercised by people acting in groups or committees. See, *e.g.*, J. Galbraith, *The New Industrial State* 60-71, 77 (1967); N. Jacoby, *Corporate Power and Social Responsibility* 58 (1973); H. Oleck, *Non-Profit Corporations and Associations* § 183 (1956). Nothing in the Labor Act entitles the Board to ignore or distort this reality.[28]

B. The Faculty's Asserted Lack of "Final Authority" Is Factually Debatable but Legally Immaterial at Best

In *Adelphi University*, 195 N.L.R.B. 639 (1972), while it candidly "manifested a progressive uncertainty," *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 277 (1974), the Board added to its idea about collective action a second point to support its view of the faculty there as nonmanagerial and nonsupervisory: that "the ultimate authority [did] *not* rest with the peer group but rather with the board of trustees." *Adelphi University, supra*, at 648 (emphasis in original). The point was reiterated in

[28] The Court of Appeals may have given more than deserved weight to a textual thought it found to suggest that "supervisors" under Section 2(11) of the Act should be expected to do their supervising as "individuals." (See Pet. App. 29a-31a.) It is true that the definition refers to "any individual having authority" of various kinds in stating what a "supervisor" is. But it does not say the "authority" must be exercised by the "individual" only individually, and the Board's own cases, as we have shown, have not required this. Understandably, then, the Board does not invoke this textual suggestion here. In any event, as the Court of Appeals also observed (Pet. App. 31a-32a), even the possible question of semantics does not arise with respect to the managerial powers of the faculty.

the Board's ruling in the instant case (Pet. App. 68a). It is another item counsel now relegate to a footnote, as something the Board "pointed out" (Br. 40-41 n.35). It is, as the Court below held, "particularly unconvincing" (Pet. App. 37a).

We may leave to one side for this purpose the evidence of record that Yeshiva faculty decisions of major managerial and supervisory consequence are very commonly "final" for all practical purposes, whatever the formalities may be. There is at any rate no basis for the idea that a person may be deemed to perform "managerial" functions, in a business or other form of organization, only if he or she exercises "final authority." On the Board's unexplained theory, most of those we all think of as "management" would be excluded.

Certainly, this novel idea would overturn most or all of the Board and court cases in which particular individuals or groups were found to be managerial or supervisory and therefore outside the class of "employees" covered by the Act. See cases cited *supra*, pp. 34-36, 41-43. In none of those cases were the various employees — buyers, expediters, etc. — anywhere close to the pinnacles of corporate power. Their authority, though not "final," was nonetheless clearly managerial. The point applies equally for the category of supervisors — from foremen to service assistants.[29] The case of the Yeshiva faculty is clearer still.

[29] It should be sufficient for this purpose to recall, briefly, relevant decisions of the Board and this Court. Board decisions cited earlier (pp. 34-35) show that relatively low-level expediters or buyers, speaking much less than the last word, may be managerial. And *Packard Co.* v *NLRB*, 330 U.S. 485 (1947), seen in the retrospective light of Congress' superseding decision to exclude foremen among others as supervisors, reminds us that such excluded personnel may be "subject, of course, to the overall control and supervision of the manager." *Id.* at 487.

C. The Idea that the Faculty Members Act in Their Own Interest Rather than that of "Management," and Are Therefore Not Managerial or Supervisory, Is Misconceived in both Fact and Law

The thought that university professors pursue their own interests, not "the management's," was added to the *C. W. Post* rationale when the Board came to decide *University of Miami*, 213 N.L.R.B. 634 (1974). Like the earlier pronouncement, it was only stated, not justified by evidence or legal analysis. It is adopted now by Board counsel as a primary point (Br. 40-45). In agreement with the Court below, we submit that it is untenable.

The Court of Appeals observed on this subject (Pet. App. 33a-34a; citations and footnote omitted):

> The record in no way supports this proposition and in its argument the Board simply advances the conclusory statement that collegial action by peers is inherently action in the interest of the faculty themselves, not in the interest of the University *qua* employer. Indeed, this is characterized in the Board's brief as a "circumstance peculiar to most institutions of higher learning." However, looking at the record one cannot escape the conclusion that even assuming that the faculty's determinations on personnel, curriculum, admissions, grading, graduation requirements and other policy issues were motivated by the faculty's own best interests, the fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interest of the faculty and of the University were almost always coextensive. * * * Certainly, the deans whom the Board found to be supervisory or managerial displayed a remarkable degree of acquiescence and often went so far as to proclaim their identity of interest with the faculty. The full-time faculty as a whole or through committees have not in fact acted simply in an advisory capacity, nor have they merely made recommendations which were accorded substantial weight; their decisions on major policy issues have, for the most part proved definitive. Our review of the record leads us to conclude that at Yeshiva University, as Director Faivelson remarked of the Teacher's Institute: "The faculty is the school."

Contradicting what the Court of Appeals wrote, the Board's brief says, in its Summary of Argument (p. 22), that "substantial evidence supports the Board's finding that faculty members at Yeshiva act in their own interest, rather than the interest of management * * *." But there is no reference to evidence, substantial or not, either at this or any other place in the Board's brief, to support the assertion.

This reflects the anterior difficulty that there is no indication what "evidence" of this nature might look like. The Board has never purported to express what it imagines is the "own interest" of university professors that distinguishes them from "managerial" personnel like buyers, expediters and others so characterized by the Board, or from supposedly self-interested workers who have been found to be supervisors. When a buyer seeks the best price for his company or a foreman seeks efficient performance on the line, he is presumably seeking the interest of "management," but not ignoring his own interest in excelling, succeeding, advancing. There is no relevant sense in which a professor is any more focused on his or her own interest.

Indeed, when the Board has permitted itself to think along this line, it has been led to recognize "the economic

benefits which faculty frequently forego to pursue intellectual goals and reap noneconomic rewards." *Syracuse University*, 204 N.L.R.B. 641, 643 (1973). It is not necessary for present purposes to contrast such goals with "bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment," for which employee representatives are contemplated in the NLRA, Section 9(a). The comparison serves merely as an apposite reminder that the Board's concept of faculty members acting in their "own interest" has no weight or utility in deciding the question presented. It is at best an unrealistic and uncertain way of describing an immaterial fact. It does not alter the crucial and indisputable facts of managerial and supervisory responsibility in the Yeshiva faculty's decisions affecting curriculum, hiring, tenure, grading and the other matters reviewed above.

There is a banal sense in which all of us act in our "own interest" all the time — in the sense that we choose to do what we do, whether it is to steal or cheat or sacrifice our lives for a cause. This is true of corporate presidents and boards of directors no less than of workers on the line. But tautologies of this kind solve no problems. And the Board has not vouchsafed even a tautology to explain what it means by saying that Yeshiva's faculty members, unlike foremen and buyers, act "in their own interest."

The dichotomous stance constructed by the Board is not only unsupported, it is belied by so much of the record as may seem relevant. The evidence shows, without contradiction, that the Yeshiva faculty's judgments are almost always accepted by the administrators with whom they share the University's governance (see, *e.g.*, A. 250, 313, 361). The record thus accentuates how meaningless it is to posit a faculty acting in "its own," as opposed to

"the management's," interest. We have urged that the Court should reject the conception of a separate, and opposed, "management" of a university like Yeshiva. But its acceptance could not enhance the Board's theory of opposed interests distinguishing faculty people from others who exercise managerial and supervisory powers in the course of earning their living.

D. Applying Unsound Law to Undisputed Facts, the Board's Decision Was Properly Denied Enforcement

There are, as stated by the Court of Appeals (Pet. App. 21a, 23a), no disputes about the material facts shown by the record. The controversy, as in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), is over the Board's legal conclusions defining "managerial" and "supervisory" for purposes of the Labor Act. The decision of the court below denied enforcement because it rejected those legal conclusions. We argue that the Court of Appeals was right.

In this legal setting, petitioners are mistaken, we think, in relying upon cases like *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), and *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978). This is not a case of a narrowly "specific application of a broad statutory term," *NLRB* v. *Hearst*, *supra*, at 131, or of "fill[ing] the interstices of the broad statutory provisions," *Beth Israel Hospital* v. *NLRB*, *supra*, at 501, or of striking an arguable balance between conflicting interests where the essential principles of law are not seriously or broadly contested (*id.*).

Here, rather, as in *Bell Aerospace*, *supra*, and myriad other cases, *e.g.*, *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *NLRB*, 365 U.S. 667 (1961); *Hotel Employees*

Local No. 255 v. *Leedom*, 358 U.S. 99 (1958); *Office Employes International Union, Local No. 11* v. *NLRB*, 353 U.S. 313 (1957), the Board has formulated rules designed for wide applicability. Indeed, the mistakes we claim the Board made include its failure to focus sharply on the concrete facts of Yeshiva University disclosed by the record. However that may be, the Board's decision is surely "reviewable for consistency with the Act, and for rationality," *Beth Israel, supra*, 437 U.S. at 501, and respondent's position is that it was correctly set aside on both grounds by the Court of Appeals.

III. DISPUTED VIEWS OF SOCIAL AND ECONOMIC POLICY, NEITHER TAKEN BY THE BOARD NOR SANCTIONED BY CONGRESS, CANNOT VALIDATE THE BOARD'S CONSTRUCTION OF THE ACT

Mention has been made above of the tendency of Board counsel to play down, nearly to suppress altogether, substantial portions of the Board's stated rationale for its decision.[30] At the same time, government counsel now tender for the Board asserted facts, not found by the agency, about the supposed effects and desirability of collective bargaining in the university, and the briefs for *amici*, notably that of the American Association of University Professors, expand on thoughts about social and educational policy nowhere mentioned, let alone adopted, by the Board as supports for its determination. It seems necessary to state, therefore, that the various assertions thus presented are unproved; that they would have been sharply contested had they been timely raised; and that they are, above all, inadmissible props for an administrative ruling that must be sustained, if it can be, "solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp., supra*, 332 U.S. at 196.

[30] See Board Brief 40-41 n.35, treating in this fashion the Board's points about faculties acting collectively and lacking final authority.

1. Government counsel tell us (Br. 45-48), citing some reports and articles but nothing in the record because there is nothing, that the right of faculties to have collective bargaining under the National Labor Relations Act is a good thing for universities and "also is consistent with traditional concepts of shared authority" (Br. 47). We are told that out of the thousands of private colleges and universities, faculty members have chosen bargaining representatives at 77 and rejected them at 41 (Br. 46 n.39). We are even cited to portions of 20 collective bargaining agreements, like all the rest unexamined and unconsidered in the record (Br. 47-48), ostensibly to show their constructive and beneficial effects.

If this were the place to open in this way a wholly new debate, it would be necessary to stress how weak the statistics are for petitioners and how few private four-year campuses have actually voted for faculty unions. We would want to consider, too, a substantial body of weighty opinion that collective bargaining in the style of industry is destructive of basic academic values; that the rise of the adversary mode on campus has already impaired some of the most cherished qualities of the community of scholars; and that there has been a decline in faculty prestige and status largely because the scholars have been seen too often to seek selfish material and other preferences at the expense of students, alumni and others with a stake in the educational enterprise.[31] Board counsel's undocumented

[31] See, *e.g.*, Dougherty, *Collegiality, Governance, and Collective Bargaining in the Multi-Campus State University of New York*, 28 Labor L. J. 645 (1977); J. Millet, *New Structures of Campus Power* 272-273 (1978); S. Hook, P. Kurtz, M. Todorovich, *The Idea of a Modern University* 166, 279 (1974).

optimism about unruffled campus "governance" with faculty unions under the NLRA would be tested by tough questions about effects on faculty or faculty-student senates, possible conflicts with other existing structures, and implications for evolving new mechanisms and procedures in the considerable flux of academies in our time.[32]

[32] Board counsel's current optimism should be contrasted with the Board's own concern on the governance question as stated in *Adelphi University, supra,* 195 N.L.R.B. at 648 n.31:

> The delegation by the University to such elected groups [the faculty committees] of a combination of functions, some of which are, in the typical industrial situation, normally more clearly separated as managerial on the one hand and as representative of employee interests on the other, could raise questions both as to the validity and continued viability of such structures under our Act, particularly if an exclusive bargaining agent is designated.

See also *Northeastern University,* 218 N.L.R.B. 247, 249 (1965), where the Board refused to pass upon the question whether departmental committees could continue in existence if the petitioner were certified as exclusive bargaining agent, this despite a letter from a group of affected faculty urging clarification because it was "in the dark as to the impact of an affirmative vote upon our collegial system with its shared governance arrangements."

A former President of the American Association of University Professors has noted that the university as we have always known it may be imperilled by the advent of faculty collective bargaining:

> The process of collective bargaining itself, which has been gaining increased ground in higher education, raises problems even apart from the strike. In dividing the university into worker-professors and manager-administrators and governing boards, it imperils the premise of shared authority, encourages the polarization in interests and exaggerates the adversary concerns over interests held in common. In placing the professor in the position of bargainer seeking to exact his demands from the university's managers and owners, the process of collective bargaining heavily burdens the professor's role as primary governor of the educational enterprise. Moreover, the process itself as it functions tends to remit issues which faculty should themselves determine to outside agencies, such as state and federal boards, arbitrators, and union bureaucracies. In addition, since unions rest on continued support of their constituency, the process becomes susceptible to essentially political rather than essentially academic decision-making.

Kadish, *The Theory of the Profession and Its Predicament,* 58 A.A.U.P. Bull. 120, 122 (Summer 1972). See also, D. Bornheimer, G. Burns, G. Dumke, *The Faculty in Higher Education* 158 (1973).

The most that could be said here about the points of view and potential conflicts thus briefly adumbrated is that they point to grave questions of judgment touching "the authority of the academic community to govern itself, an authority the free exercise of which is critical to the vitality of our society." *Cannon* v. *University of Chicago,* No. 77-926 (May 14, 1979) (Powell, J., dissenting), slip op. 18. The thought promptly following would be that "it is the constitutional function of the Legislative Branch, subject as it is to the checks of the political process, to make this judgment." *Id.* at 19. It would at a minimum be strongly arguable that we would be dealing with "policy considerations more properly addressed to Congress than to this Court." *Reiter* v. *Sonotone Corp.,* No. 78-690 (June 11, 1979), slip op. 11; see also *Packard Co.* v. *NLRB,* 330 U.S. 485, 500 (1947) (Douglas, J., dissenting); Friendly, *The Courts and Social Policy: Substance and Procedure,* 33 U. Miami L. Rev. 21, 22 (1978).[33] *A fortiori,* then, if we were confronting arguments adopted by the Board itself rather than advanced as "appellate counsel's *post hoc* rationalizations for agency action," *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962); see also *NLRB* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438, 444 (1965), there would be severe doubt about the propriety of such policy

[33] Board counsel, alert to nearby implications, assure us (Br. 35 n.29) that this is not a case, like *NLRB* v. *Catholic Bishop of Chicago,* No. 77-752 (March 21, 1979), where it might require "a clear expression of Congress' intent" (*id.,* slip op. 17) to extend the Board's jurisdiction over faculty. It is true that Yeshiva has not raised the broad question of "jurisdiction" over the University generally, and no question has been presented relating to the religion clauses of the First Amendment. But the extension of coverage *to faculty,* especially had there been an airing of the broad policy impacts the Board chooses now to implicate for the first time, might well have triggered a debate over the academic freedom aspects of the First Amendment, on which see the observations and citations in the dissent of Mr. Justice Powell in *Cannon* v. *University of Chicago,* quoted *supra.*

judgments as grounds for the Board's belated decision to begin in 1971 treating university professors generally as "employees" within the Act.

Returning to fundamentals, we stress that none of this is found in the Board's record or reasoning. It is not available or effective to support what the Board actually decided.

2. Less important, and no less clearly immaterial, is counsel's stress upon the "faculty's strong vote for the Union" (Br. 53). The Board's decision rested, of course, upon grounds that were required in their nature to precede any vote; it could not be validated later by a pro-union vote. If it were necessary to recall precedent for this purpose, we would remember that foremen and other supervisors were organizing in appreciable numbers when this Court held them within the NLRA, *Packard Co.* v. *NLRB*, 330 U.S. 485 (1947), and Congress soon chose none the less to exclude them in Section 2(3) and (11) of the Act as amended in 1947.

We need not solemnize Bernard Shaw's jibe at professions as "conspiracies against the laity" to know that all kinds of groups, from corporate presidents to unskilled laborers, may have an interest in organizing for maximum rewards. The question, as the Board properly saw it, was not whether Yeshiva's faculty might deem itself advantaged, perhaps at the expense of others in the University, by NLRA coverage. It was and is, by wholly other tests, whether the faculty members are "employees" for the Act's purposes.

3. Other asserted theories and unproved allegations of fact, mostly laced through the *amicus* briefs, are distractions at best from the question presented to this Court. Without cataloguing all, we note such untested

"information" and opinion as inferences from a study of decision-making at New York University,[34] problems of nonaccountability at Northeastern University,[35] and speculations about the potential effects of a decision in this case upon the totally different areas of elementary and secondary education.[36] None of these things in our view should have any bearing upon this Court's deliberations. The question is only whether the Court of Appeals was right in holding that the Board's decision, rested upon the Board's reasons and the record it had made, could not be squared with a principled construction of the Act.

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[34] YUFA Brief 34-35.

[35] Board Brief 42.

[36] NEA Brief 13-14.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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